

Dispute Concerning the Polish Constitutional Tribunal

Zdeněk Koudelka

Poland is currently under criticism for an amendment of the Constitutional Tribunal Act passed by the new government majority party called Law and Justice (PiS). Let us look at the facts.

New Polish Constitutional Tribunal Act of June 2015

In June 2015 President Bronisław Komorowski, before the end of his term in office and that of the government of Prime-Minister Ewa Kopacz, approved a completely new Constitutional Tribunal Act.¹ The President as well as the government represented the Civic Platform (PO) generally known to be heading towards defeat in the presidential as well as parliamentary elections scheduled for 2015. And that was indeed the case. The new Polish President, Andrzej Duda, a representative of the Law and Justice party, was elected on 24 May 2015 and his inauguration was held on 5 August 2015. On 25 October 2015 the same party subsequently achieved an overwhelming victory in the parliamentary elections with an absolute majority of votes both in the Lower Chamber of the Polish Parliament (Sejm) and the Senate. The new Constitutional Tribunal Act was passed in June 2015 against the will of the opposition by the then holders of political power in the country. At that time the previous President was already defeated in the presidential elections and the defeat of the current government was imminent. The political legitimacy of that representation was considerably weakened by then. In the new Act the Civic Platform party passed regulations making it possible to elect new judges no sooner than within three months before the mandate of the current judges of the Constitutional Tribunal expires and their term of office ends, and explicitly allowed for the transitory election by the previous Sejm of new judges in replacement of all the judges whose mandate expired in 2015. At that time, prior to the elections scheduled for later that year, the Civic Platform still held the majority in the Sejm.² The President of Constitutional Tribunal, Andrzej Rzepliński, and his deputy, Stanisław Biernat, approved for their offices by the Civic Platform, actively participated in the drafting of the Act.

Judges Inaugurated by the Civic Platform in October 2015

Polish constitutional judges are elected by the Sejm in Poland.³ The term of office of the Sejm is four years. Its detailed regulations state that the term of office begins on the day of the first assembly summoned by President of the Republic of Poland and ends on the day preceding the day of the first assembly of the subsequently elected Sejm.⁴

The Civic Platform government decided to secure posts for their candidates in the Constitutional Tribunal before their term in office ended even though they no longer had the confidence of their electorate. Therefore they elected five new constitutional judges out of a total of fifteen on 8 October 2015, shortly before the scheduled parliamentary election at the

¹ Act of 25 June 2015 on the Constitutional Tribunal, Journal of Laws No 1064/2015. The Act came into force on 30 August 2015.

² Section 137 of the Constitutional Tribunal Act of 25 June 2015.

³ Section 194 (1) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No 483/1997.

⁴ Section 98 (1) and Section 144 (3) (2) of the Constitution of the Republic of Poland.

end of 7th electoral term of the Sejm (2011-15), to replace the judges whose term in office ended in November and December of 2015, i.e. after the election of the new Polish Sejm for the 8th electoral term, which took place on 25 October 2015. Thus all of the 15 judges of the Constitutional Tribunal were elected within two terms of the Sejm when the Civic Platform was the majority party. In 2015 the term of office for the last judges elected in the period of the first government of the Law and Justice party 2005-07 ended. However, the Polish constitution, by enactment of the nine-year term of office of the judges of the Constitutional Tribunal assumes that a complete replacement can be made over up to three Sejm terms in succession for the four-year term of office of the members of the Sejm.

This step was not accepted by the then opposition Law and Justice party, and was countered by the new President of the Republic of Poland, Andrzej Duda, who did not invite the newly elected judges to take their vow before him, which is the legal pre-condition of their inauguration.⁵ This concerned the following judges: Roman Hauser, Krzysztof Ślębzech, Andrzej Jakubecki (due to be inaugurated on 7 November 2015), Bronisław Sitek (due to be inaugurated on 3 December 2015), and Andrzej Jan Sokala (due to be inaugurated on 9 December 2015).

The dispute was fuelled on 3 December 2015 by the Constitutional Tribunal itself, which declared the election of the new judges in 2015 by the old Sejm as unconstitutional as far as this concerned the replacement of those judges whose term of office was to end after the beginning of the term of office of the newly elected Sejm.⁶ This meant in fact that the Constitutional Tribunal ruled that the judges whose term of office began in November 2015 were elected in compliance with the Constitution, while the two judges to be inaugurated in December were deemed to be elected unconstitutionally. The Constitutional Tribunal based its judgement on the fact that the provision of the Constitutional Tribunal Act passed by the Civic Platform in June 2015, allowing for the election of constitutional judges by the Sejm before the mandates of the current judges expired⁷, may not be used by the Sejm to elect judges whose term of office is to start after the term of office of the Sejm electing them expires. The Constitutional Tribunal considered the fact that the 7th electoral term of the Polish Sejm, controlled by the Civic platform, expired on 11 November 2015, however the new Sejm was already elected in October for the 8th electoral term - with the first day of office on 12 November 2015.

When hearing this case the Constitutional Tribunal acted in violation of the law. Subsequent judicial review of the legislative acts passed in Poland can be judged by a five-member judicial body according to the original wording of the Constitutional Tribunal Act, unless the case is assigned by the President of the Tribunal to the general assembly as an issue of substantial significance. This is the Tribunal's President Andrzej Rzepliński initially did in the

⁵ Section 21 of the Constitutional Tribunal Act of 25 June 2015.

⁶ Decision of the Constitutional Tribunal published on 16 December 2015, Journal of Laws No 2129/2015.

⁷ Section 19 (2) of the Constitutional Tribunal Act of 25 June 2015 in the wording before it came into force, Journal of Laws No 1928/2015., shortening this deadline to 30 days.

⁸ Act on the Amendment of Constitutional Tribunal Act of 19 November 2015, Journal of Laws No 1928/2015. <http://dziennikustaw.gov.pl/du/2015/1928/1>

⁹ Decision of the Constitutional Tribunal, published on 18 December 2015, Journal of Laws No 2147/2015.

¹⁰ The Czech Television programme called *Události, komentáře (Events, Comments)*, ČT 24 on 19 January 2016, featured a discussion about the criticism of the central European institutions based in Brussels levelled at Poland, and concerning the election of a government in Poland that is not pro-European. The programme included an incorrect statement by European MP Stanislav Polčák (TOP 09), who said that the new Polish government refused to publish the decision of the Polish Constitutional Tribunal of 9 December 2015 concerning constitutionality of the amendment of the Constitutional Tribunal Act. This nonsense was confirmed by the present Prime Minister's Secretary for European Matters, Tomáš Prouza. In reality, the decision was published as early as 18 December 2015, Journal of Laws No 2147/2015.

name of the Civic Platform. When, however, he saw that he would not have a sufficient number of judges in the general body to judge the case, for he himself was considered biased and he did not accept the mandate of the judges elected on 2 December 2015, he decided to refer the case for judgement to a five-member judicial body. Such a reassignment of a case from the general assembly to a five-member judicial body is not allowed by the Constitution or the Constitutional Tribunal Act.

Judges Elected by Law and Justice in December 2015

Prior to this, the Law and Justice party passed a resolution in the Sejm on 25 November 2015 invalidating the election of 5 candidate constitutional judges on 8 September 2015, and requesting that the President of the Republic of Poland does not accept their vows. On 2 December 2015 the Sejm elected five new constitutional judges and the President accepted their vows on 3 December 2015 (4 judges) and on 9 December 2015 (1 judge). The decision of the Constitutional Tribunal of 3 December 2015, published in the Journal of Laws on 16 December 2015, was then commented on by the Presidential office. The comment was that the President cannot accept the vows of the 3 judges elected on 8 October 2015, whose election was declared by the Constitutional Tribunal to be compliant with the Constitution, for the Constitutional Tribunal seats were by then already all occupied.

In addition, on 19 November 2015 the first amendment of the Constitutional Court Act was passed⁸. Under this amendment, for example, the term of office of President and Vice-President of the Constitutional Tribunal was shortened to three years and the deadline for the commencement of the process of election of a new judge before the expiry of the term of office of the existing judge, was shortened from 3 months to 30 days. This amendment was however declared by the Constitutional Tribunal as mostly in violation of the Polish Constitution on 9 December 2015.⁹ The decision was published on 18 December 2015.¹⁰

Judges Struggle for Incumbencies

According to the original Act on the Polish Constitutional Tribunal of 1985 the rights and obligations of the judges of the Constitutional Tribunal were governed by the Supreme Court Act.¹¹ Until 1997 the retirement of judges was not covered by the Polish law. Judges retired according to the general pension scheme regulations. The old-age pension was much lower than the salary a judge received when active, which was also true for many other social fund pensioners.

In the executive legislative acts that followed the passing of the Polish Constitution of 1997 the retirement of judges of general, administrative and military courts was regulated.¹² Under this retirement scheme the judge's appointment was effective until the end of the judge's life.

The commentator of the Czech Television failed to react to this nonsensical statement. This is just one example of the numerous lies and semi-truths about the current situation in Poland and an example of poor quality of information disseminated by the Czech Television, whose commentators should study political issues to obtain a sufficient insight before they moderate such discussions. Compare with the findings of our Constitutional Court decision of 15 September 2015 (Journal of Laws 299/2015), announced orally on 23 September 2015, and published in the Journal of Laws only on 10 November 2015. In Poland publication happens within 9 days, while in our country the same process takes months.

¹¹Section 16 (1) of the Act on the Constitutional Tribunal, Journal of Laws No 98/1985. I would like to express my thanks for the information provided by a leading Polish constitutionalist, Boleslaw Banaszkiewicz of Warsaw.

¹²Section 175 of the Constitution of the Republic of Poland

Thus, a retired judge remained in quasi-employment without actually having to work. This is a mere legislative fiction aimed at dealing with the fact that the level of old-age pensions due to judges was deemed to be unjust in the perception of the other citizens of the Polish State. The Constitution does not classify the Constitutional Tribunal and the State Tribunal as a common court. The difference is that common courts, including administrative and military courts, are named using the Slavic term for the court,¹³ while the Constitutional and the State courts are named after the Latin “tribunal”.¹⁴ The provisions of the Constitution referring to the judges of the Constitutional Tribunal do not deal with retirement but the term of office of the Constitutional Tribunal judge.¹⁵ Common court judges are not appointed for a term of office and retire for age or health reasons, which is formally their last stage of their career. In case of Constitutional Tribunal judges there is the 9-year term of office¹⁶ after which they cease to be constitutional judges.

When in 1997, following the passing of the new Constitution, President Aleksander Kwaśniewski initiated amendments to the court and tribunal legislation, the Constitutional Tribunal judges influenced the President and made sure that the Constitutional Tribunal Act of 1997, as did the Act of 1985, included an inconspicuous legislative reference to the rights and obligations of Supreme Court judges.¹⁷ Thereby, the judges of the Constitutional Tribunal, in spite of the absence of any explicit clause referring to their retirement in the Act, secured the standard retirement provisions reserved for judges, including the financial benefits associated, and they began to interpret any legislation concerning them in this context.

The Constitutional Tribunal Act of 2015 openly restates the to-date privileges of constitutional judges:

- The salary of a judge is five times the average wage calculated without the costs of social insurance. The average is calculated from the second quarter when most employers pay out mid-year bonuses and contributions until the summer holidays, which means that this average is generally higher than the annual average wage.¹⁸ In the case of a decrease in the common average wage the salary of Constitutional Court judges is preserved without any reductions. Even if Poland went bankrupt and the rest of the nation started dying of poverty the judges of the Constitutional Court wish to have their incumbencies preserved regardless the poverty of the people and the State,
- Combining the judge’s position with a salary for full-time research or academic work.¹⁹ Profit-making activities outside the Tribunal are the reason why the Constitutional Tribunal decisions take such a long time. This is true despite the fact that, as a body responsible exclusively for a review of constitutional standards and not dealing with the constitutional complaints of private individuals, the Polish Tribunal has to deal with a considerably lower number of cases than constitutional courts in other countries,
- Retirement after expiry of the official term of office with the right to old-age pension, regardless the age, in the amount of 75% of the current salary of Constitutional Tribunal judge,²⁰

¹³In Polish “sąd”.

¹⁴Tribunal in Ancient Rome meant the raised seat of a judge.

¹⁵Section 196 (3) of the Constitution of the Republic of Poland.

¹⁶Section 194 (1) of the Constitution of the Republic of Poland.

¹⁷Section 6 (8) (originally (4)) of Act on the Constitutional Tribunal, Journal of Laws No 643/1997.

¹⁸Section 33 (1) and (2) of the Constitutional Tribunal Act, Journal of Laws No 1064/2015.

¹⁹Section 23 (2) of the Constitutional Tribunal Act of 2015.

²⁰Section 37 and Section 40 (2) of the Constitutional Tribunal Act of 2015.

- Right to an earlier retirement for health reasons,²¹
- Right to severance pay in the amount of six monthly salaries upon retirement.²² This incumbency is quite peculiar and incompatible with the ideas of social justice and equal rights under law. The reason is that while under labour law a severance pay is treated as compensation for losing a job, the retirement of a judge is not such a case. The judge retains the title of a judge, the use of the office car from time to time, and receives the salary of a judge although he does not have to work as judge any longer. The right to severance pay upon retirement is excused by the fact that in 1997 the provisions for the retirement of judges were added to the Supreme Court Act while someone ‘forgot’ to cancel the previous provision on severance. But why was this error retained in the new Constitutional Tribunal Act of 2015? When it comes to the benefits of the Constitutional Tribunal judges the law, logic and common sense remain silent.

The Act on the Polish Constitutional Tribunal, whose draft was prepared by the affected judges themselves, confirms the words of the Roman Emperor Vespasian: “*Money does not stink*.” It is not surprising that in the course of the dispute about the composition of the Polish Constitutional Tribunal in 2015-16 neither the judges appointed by the Law and Justice party nor those appointed as representatives of the Civic Platform questioned these incumbencies. Every judge, be it ‘Paul or Saul’, wanted to retain them. However, the incumbencies of the Constitutional Tribunal judges are immoral. That is why the Constitutional Tribunal has earned the charisma of ‘a drenched rag’ in the eyes of many ordinary Poles, not in the least interested in its composition.

Second Novella of Constitutional Tribunal Act of December 2015

The Polish Parliament, with the consent of Polish President, passed another amendment of the Constitutional Tribunal Act in December 2015.²³ The principal change was the strengthening of collective general decision-making process of the Constitutional Tribunal at the cost of the small judicial bodies. In principle, now all 15 judges will be ruling in the general assembly, unless otherwise stipulated by law. Any cases not decided by the general assembly of all the judges, will be heard by a seven-member body instead of the to-date three-member one. There were also five-member bodies in addition to the three-member ones, deciding for example on the non-constitutionality of legislative acts. This competence is now reserved for the general assembly of the Constitutional Tribunal.

The general assembly of the Polish Constitutional Tribunal will now make decisions in a quorum of at least 13 of the total 15 members, including the compulsory presence of the President or the Vice-President. The decisions will be reached by a two-thirds majority. The most important power of all constitutional courts is the power to revoke ordinary legislative acts on the basis of their incompliance with the constitution. In our country the Constitutional Court can thus cancel an ordinary legislative act in its general assembly in the presence of at least 10 judges. At least 9 judges have to vote in favour of revoking the act. Therefore, in the quorum of 10 judges 9 judges represent a 90% majority. When comparing this with the Polish Constitutional Tribunal you can see that while our quorum requirement is 3 judges less – 13 judges in Poland, 10 judges in our country, the requirement for passing a decision is similar in both countries in terms of the proportion of the total number of judges in the court, two thirds

²¹Section 38 of the Constitutional Tribunal Act of 2015.

²²Section 40 (1) of the Constitutional Tribunal Act of 2015.

²³Act on the amendment of the Constitutional Tribunal Act of 22 December 2015, Journal of Laws No 2217/2015.

in Poland (60% of the 15 judges), or three fifths in our country (66.6% of the 15 judges or 90% of at least 10 judges present).

The fact that the amendment of the Constitutional Tribunal Act of December 2015 introduces the rule that the general assembly makes decisions in substantial matters is an attempt to rectify the previously to-date non-constitutional situation, as the Polish Constitution requires a simple majority of votes for decisions made by the Constitutional Tribunal.²⁴ The Constitution does provide any rules for decision made by a smaller judicial body. Previously, when non-constitutionality of a legislative act or an international treaty or other important matters were decided by five-member bodies of the Constitutional Tribunal, including cases where legislative acts were revoked on the basis of non-constitutionality, which is always a cardinal question and where the judicial power intervenes with the legislative power, the joint will of the Sejm, the Senate and President of the Republic of Poland could be thwarted in practice by just three judges in a five-member judicial body, even if all the other judges of the Constitutional Tribunal might consider the legislative act to be in compliance with the Constitution. This situation was in contradiction with the Polish Constitution, requiring a simple majority of all the judges to decide about these matters. If non-constitutionality of a legislative act could be decided by just three judges, then this was a minority of all the constitutional judges.

The new amendment is disputable in the fact that it is not clear whether the constitutional requirement of majority of votes may be interpreted at the sole discretion of the legislator and who would decide whether this majority is to be defined as simple, absolute or qualified. It also remains unclear whether it is necessary to use the narrow interpretation in terms of absolute majority and whether this absolute majority should be calculated from all or just the judges present at the hearing. Where the Constitution is tacit a more detailed stipulation of these matters by ordinary legislation is a must.

Decision-making by supreme court institutions in general assembly rather than in small judicial bodies serves the idea of achieving consistency of decisions in similar cases. Even our constitutional court is criticised for lack of consistency in its decision-making in the various three-member bodies. The Constitutional Court of the Czech Republic has decided to prevent this by delegating some matters to the general assembly,²⁵ albeit this is not directly required by the law (constitutional complaints against President, the Parliament and special bodies of the Supreme Administrative Court, electoral matters relating to parliamentary and presidential elections), and further by introducing rotation of judges between the judicial bodies every two years since 2016.²⁶ These changes are governed by the effort to eliminate inconsistency of decision-making. However, these changes are still insufficient, for consistency of decisions may only be achieved by decision-making in the general assembly of all the judges in all matters. This is how the Supreme Court of the U.S.A. or Denmark decides, for example. In our country and in Slovakia the most important competence of the Constitutional Courts – the right to judge on the constitutionality of ordinary legislation – is also decided by the general assembly and not by the smaller judicial bodies of the Constitutional Courts.

By comparison, it is noteworthy that the First Republic Czechoslovakian Constitutional Court had to make decisions about the invalidity of an ordinary legislative act by the majority of at least five out of the total seven members in the presence of a quorum of at least five members.²⁷ This meant that any decision about the invalidity of an unconstitutional act

²⁴Section 190 (5) of the Constitution of the Republic of Poland.

²⁵Communication of the Constitutional Court on delegation of power, Journal of Laws No 52/2014.

²⁶Decision of the General Assembly of the Constitutional Court on appointment of the Senate of 8 December 2015, Org. 60/15.

²⁷Section 8 of the Act on the Constitutional Court, Journal of Laws No 162/1920.

required the consent of 71% of all judges or a unanimous decision in the quorum of at least five judges. Even the act on the first Czechoslovak Constitutional Court required the presence of the President or the Vice-President and other four members of the court. The President was even given the decisive vote in the case of equal distribution of votes, which however did not apply to decisions invalidating legislative acts, where at least five affirmative votes were required. The Czechoslovak Federal Constitutional Court decided about non-constitutionality of a legislative act also in its general assembly where at least nine of the total of twelve judges had to be present, or three quarters of all judges (75%).²⁸ Decisions were passed by an absolute majority of votes, with the exception of changes to legal opinions previously expressed by the Constitutional Court in the matters of Constitution interpretation where at least 9 judges had to be present.

The Polish amendments strengthening the general assembly decisions at the cost of small legislative body decisions are fully compatible with the European principles of constitutional judicature. They are also close to our constitutional law. Therefore criticism of these steps is based on non-legal arguments. These are the same arguments for which the new Hungarian constitution was also criticised, including for example the ridiculous criticism of the fact that the Hungarian Minister of Finance would be allowed to take part in the meetings of the board of the Hungarian National Bank, which has been a long established rule in our country and elsewhere, and which has never been contested.²⁹ What does not matter in our country and in other countries did matter in Hungary. As in the case of Hungary, in Poland the real reasons behind the criticism lie in the fact that both countries, in compliance with the will of their electorate expressed in the general elections, chose a path different to the one preferred by the minority losing the elections, and dear to certain Brussels officials. But that is the essence of democratic elections.

The First Vice-President of the European Commission, Frans Timmermans, before President Duda signed the act amending the Constitutional Tribunal Act, called for a suspension of the approval process. The Luxembourg Minister for Foreign Affairs, Jean Asselborn, whose country held the European Union presidency in the latter half of 2015, said on 24 December 2015 that the developments in Warsaw remind him of the dictator regimes in post-Soviet countries and that following the restriction of the independence of courts, restriction of the freedom of expression may be expected next and thus the European Union is obliged to impose respect for the fundamental freedoms and should act on this matter.³⁰ The President of the European Parliament, Martin Schulz, even spoke about a State coup in connection with the post-election changes in Poland.

When assessing these threats to Poland by Brussels officials one cannot help but recollect the Brezhnev doctrine of restricted sovereignty of socialist States. In today's Europe countries can be free but only if their idea of freedom corresponds to the political ideas of Brussels. This is not real freedom, though. And it is not sovereign Statehood either. Both the Hungarian and the Polish examples show that heads can be raised and foreign pressure may be opposed. The question whether courts decide about certain matters in their general assembly or in small judicial bodies, and what the composition of these will be is a purely internal issue falling within the sovereign powers of any State that is not a protectorate.³¹

²⁸Section 9 of the Act on organisation of the Constitutional Court of the Czech and Slovak Federative Republic and on proceedings before this court, Journal of Laws No 491/1991,

²⁹Section 11 of the Act on the Czech National Bank, Journal of Laws no 6/1993.

³⁰http://zpravy.idnes.cz/evropska-komise-vyzyva-varsavu-aby-zvazila-sporny-zakon-o-ustavnim-soudu-1ul-zahranicni.aspx?c=A151225_112519_zahranicni_ert

³¹For example, the changes in composition and decision-making practice of the Constitutional Court in Bosnia and Herzegovina were laid down by the Dayton Peace Treaty stating that three out of the nine judges would be foreigners selected by President of the European Court for Human Rights. Unilateral change is not possible

under the current legal situation. In fact, Bosnia and Herzegovina is thus an international protectorate. The protector is the high representative for Bosnia and Herzegovina, who may even recall any local official, including members of the collective head of the State – presidency of Bosnia and Herzegovina. This is definitely not what sovereignty of a State is about.